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No. 88-1852

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

BRADLEY FACILITIES, INC.,
Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION FOR THE STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

The respondent, J. William Burns, Commissioner of Transportation for the State of Connecticut, prays that a writ of certiorari, as requested by the petitioner, Bradley Facilities, Inc., not be issued to review the judgment of the Connecticut Supreme Court rendered on December 27, 1988.

STATEMENT OF THE CASE

This case involves the condemnation by respondent, under the power of eminent domain, of the petitioner's remaining leasehold interests in premises leased to the petitioner by the respondent, and the fixing of condemnation damages by using the formula prescribed in the lease agreement, between the parties, for the calculation of such damages. The respondent, acting in the name of the State of Connecticut, filed a statement of compensation and served notice upon the petitioner pursuant to Connecticut General Statutes, Sections 13a-73 and 13b-42(e) (Pet. 5),* condemning petitioner's leasehold interest at Bradley International Air Terminal, and setting the amount of damages at a nominal amount of $1.00. (Ex. L)

The petitioner, pursuant to Connecticut General Statutes, Section 13a-76 (Pet. 4), appealed to the Superior Court for a reassessment of the $1.00 damages. The reassessment appeal was, as required by Section 13a-76 (Pet. 4), referred to a State Trial Referee, and the matter was assigned to the Honorable Charles S. House for hearing, decision, judgment, and all further proceedings including matters pertaining to any appeal therefrom. (35A) A trial was held on September 3, 1986, February 3, 1987 and March 10, 11, 1987, after which the State Trial Referee rendered judgment in favor of the petitioner and raised the award from the nominal $1.00 to $146.38, which was the amount calculated by a certified public accountant in accordance with the provisions of paragraph 28 of the lease agreement (Pet. 40a, 50a, 51a, 52a, 66a).

The petitioner appealed the judgment of the Superior Court to the Connecticut Appellate Court, and the appeal was removed to the Connecticut Supreme Court, on its own Motion. The required briefs were filed and extensive argument was heard during which the Supreme Court Justices

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* (Pet. — Petition for A Writ Of Certiorari to the Connecticut Supreme Court in this case.)

vigorously questioned both counsel on the legal application of the facts found at trial. The transcript of that hearing is produced in the Appendix. (1A)

Petitioner, at page 9 of the Petition, correctly states the law in Connecticut:

> "It is a fundamental principle of law that the power to appropriate private property for public use is an attribute of sovereignty and essential to the existence of government. 1 Nichols, Eminent Domain (3rd Ed.) §§ 1.14, 3.1; Am. Jur. 635, § 7. It attaches to every man's land and is paramount to his right of ownership. It lies dormant in the state until set in motion by legislative enactment." *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 586, 87 A.2d 139 (1952). (Citations omitted) (22A)

However, petitioner neglected to continue the statement of law in *Northeastern Gas, supra*, 587, which states, "The legislature itself may exercise the power or may delegate that right to another." (This principle of law was stated by the Connecticut Courts as far back as 1847 in *Clark v. Saybrook*, 21 Conn. 313.) (21A, 36A) Consequently, the petitioner incorrectly stated at page 9 of the petition that, "At the time the State entered into its lease with petitioner, and continuing through 1981, the State did not have authority to condemn its own leases for airport land." The State, as the sovereign, always had the inherent right to condemn leasehold interests, whether for airport land or otherwise. (25A) A Connecticut case exactly on point (Pet. 24a), where a leasehold was condemned by the lessor was decided in 1941. See *Town of Danbury v. Danbury Airport Corporation*, 9 Conn. Sup. 319, 321. (22A, 37A)

Furthermore, at the time the lease contract between the parties was executed, the State had the statutory authority to condemn leasehold interests under the provisions of Connecticut General Statutes, Section 15-79 (34A), which stated in pertinent part:

> "The State . . . may establish, maintain and operate an airport at any location within the State . . . and

may take any such land *or interest therein* for such establishment or for the expansion or improvement of an airport . . . upon paying just compensation to the owner of such land *or interest therein* . . . ." (Emphasis added)

The Connecticut Legislature did not delegate the power to condemn leasehold interests in airport land to the Commissioner of Transportation until July 1981 when Public Act 81-421 (Section 13b-42(e)) (Pet. 5) became effective. However, the Legislature could have exercised that power, at any time, by enacting a Special Act for that particular purpose. (21A)

The Connecticut Legislature, by enacting Public Act 81-421 (Senate Bill 1425), merely decided it would be administratively expedient and extremely cost effective, in an era of rapidly rising prices, to grant authority to the Commissioner of Transportation to condemn leasehold interests in the same manner as the Commissioner had for the condemnation of a fee simple. State Senator Thomas Serrani, Co-Chairman of the Connecticut Senate and House Joint Transportation Committee, in addition to the comments presented by the petitioner at pages 10–11 of its petition, stated:

"Right now we have some major time delays in certain projects dealing with transportation particularly in the area of airport expansion . . . . This bill . . . would cut down on some of the paper work . . . . As you know, with inflation as it is today some of these major projects would turn in millions of dollars by being delayed for a month . . . . (I)t's important that we move quickly on all of these projects and the Department of Transportation is well equipped to do this as they have been doing for many years in the highway and bridges area . . . ." (41A)

"The Finance Committee here in the General Assembly has passed one hundred million dollars bonding authorization for the completion of the

Bradley master plan and that Department wants to move ahead with this program. . . ." (41A)

Senator Serrani reiterated his comments the following day and again emphasized the saving of millions in the Bradley Terminal expansion project costs. (42A, 43A) In further discussion of the Bill, Senator Serrani stated that the reason legislation was needed was, "I think *the intent is there* but it is unclear of that understanding, and therefore, that's why the legislation, the amendment is before us. . . ." (Emphasis added) (43A)

State Representative John T. Pier, the other Co-Chairman of the Senate and House Joint Transportation Committee, also clearly indicated the legislative intent in enacting Public Act 81-421 when he stated to the House:

". . . It is keyed primarily to *enabling legislation* for the expansion and development of Bradley International Airport but also affects other major transportation facilities and the like. . . ." (Emphasis added) (44A)

"(W)hat it provides is the authority to the Commissioner of Transportation to condemn leaseholds in the same basis as any other property interest at an airport facility. . . . *It is simply enabling legislation* to make it very clear that the state has the authority to condemn the leases. It's *probably already true in the law* but there is some question at whether it would have to go to litigation. . . ." (Emphasis added) (44A, 45A)

Finally, at the Joint Transportation Committee hearings the then Commissioner of Transportation, Arthur B. Powers, stated that the Bill would enhance the speedy and orderly development of Bradley International Air Terminal. (46A) Therefore, the petitioner is clearly in error in the claim made at page 10 of the petition that, "There can be no question

that the legislation enacted, Connecticut General Statutes, Section 13b-42(e) (Public Act 81-421) was directed *solely* to petitioner's lease and was *intended* to change the existing rights between the petitioner and the State by affording the State a previously *non-existent* right to condemn petitioner's leasehold interest. . . ." (Emphasis added) The State always had that right and the legislation was a public act, not a special act, and it affected all leases at airport facilities.

Petitioner also claims that respondent had "set aside" one million dollars to pay for petitioner's leasehold interest, and offers a reference to the trial transcript as proof of that fact. (Pet. 9–10) Petitioner again makes a statement of fact without proper or adequate foundation. The transcript reference is to testimony of petitioner's president, Daniel J. McCauley (Tr. Sep. 3, 1986, 2), and McCauley would have no direct knowledge of respondent's intent or financial plans and procedures. Significantly, petitioner did not introduce any substantiating documentation to prove its claims even though petitioner had ample time and opportunity to secure that documentation from the respondent, through discovery procedures, if, in fact, such documentation existed. The exhibit reference (Ex. J) indicates there was an estimate of possible costs made and no one ever offered documentation of a commitment or obligation of funds would have been necessary to "set aside" monies for any particular expenditure. An estimate of costs does not, in any way, "set aside" funds or establish liability.

Petitioner states (Pet. 12) that as part of the stipulation (Pet. 53a) signed by the petitioner and respondent to conclude the injunction action in 1982, petitioner expressly provided that ". . . (I)ts rights in connection with any condemnation award . . ." were not waived. Petitioner asserted every right it had in the condemnation and nothing was waived by the petitioner or taken away by the respondent. Petitioner had the right under the Federal and State Constitutions to receive just compensation for the taking of its property. Petitioner was paid $1.00 nominal damages (Ex. L) by respondent.

Petitioner asserted its right in accordance with General Statutes, Section 13a-76 (Pet. 4) to appeal that nominal award to the Superior Court and to be heard on the issues. After an extensive trial, the Superior Court found that the lease contract clause, paragraph 28 (Pet. 52a, 66a), applied and damages should be calculated in accordance with the terms of paragraph 28. Accordingly, the state referee raised the damages to $146.38. Petitioner was not pleased with the judgment of the Superior Court, and asserted its right to appeal that judgment to the Connecticut Supreme Court. Now the petitioner is asserting its right to petition this Court to have the Connecticut courts' decisions reviewed.

Finally, petitioner claims (Pet. 14–19) that Article 28 (paragraph 28 of the lease agreement) should not have been used by the court to establish the "just compensation" for the taking of petitioner's leasehold interest. Petitioner relies on three arguments:

1. Article 28 could only apply to a taking by the Federal Government. (Pet. 15, 16, 17)

2. The "entire demised premises" were not taken and the second portion of paragraph 28 should apply. (Pet. 15)

3. Officials of respondent represented to the Connecticut Legislature that the lease agreement contained no understanding concerning condemnation of petitioner's leasehold interest. (Pet. 13)

Petitioner argues that paragraph 28 could only apply to a Federal taking and relies on the sharing provision in the paragraph. However, the telling language in the paragraph is, "(T)here shall be paid or turned over to Tenant, as or from the award." (Pet. 66a) Extracting from the quote, "(T)here shall *be paid* . . . to Tenant *as* . . . the award." That language can only be applicable if the State condemns the petitioner's leasehold interest. The remaining language,

"(T)here shall be . . . turned over to Tenant . . . from the award," can only be applicable if the Federal Government, or other third party, condemns the fee and paid damages to the respondent and respondent would "turn over" a portion of the award calculated in accordance with the provisions of paragraph 28. (32A, 33A) (Pet. 18a, 19a) It should be noted that damages would still be the unamortized value of the leasehold improvements ($146.38) in either case. (28A, 29A, 31A, 32A) Petitioner also relies on three documents composed by an attorney who was transportation counsel from 1978 to 1983. (Tr. Sep. 3, 1986, 110) These documents were introduced as Exhibits O, P, Q and were simply one individual's analysis of the language contained in paragraph 28. (25A, 26A) The Connecticut Supreme Court concluded that the construction of the lease by this official was erroneous. (Pet. 28a, 29a)

The meaning of the term "demised premises" is clear and unambiguous. The leased premises are identified at p. 1 of the lease (Ex. A) (Pet. 61a) (23A) as follows:

> ". . . Landlord does hereby let, grant, *demise and lease* unto Tenant and Tenant does hereby hire and take from Landlord, *the particular premises shown . . . (which particular premises so shown, with the building and improvements to be constructed thereon, are hereinafter called the 'Demised Premises')*. . . . TO HAVE AND TO HOLD *the Demised Premises* unto Tenant for a term. . . ." (Emphasis added)

This language indicates the parties' intent to define the leasehold interest as the "demised premises." The purpose in using this defined term was simply to identify the premises demised or leased to Bradley and taken by respondent. (See Pet. 13a-19a)

The second portion of paragraph 28 (Pet. 68a) cannot apply to the facts in this condemnation. The language in the

second portion refers to "temporary use or occupancy" and the lease shall not terminate. (Pet. 68a) The condemnation was not for temporary use or occupancy and the lease did terminate, therefore, the second portion of the paragraph is not applicable. (23A)

A review of the entire text of the testimony of Commissioner of Transportation, Arthur B. Powers, before the Joint Transportation Committee does not indicate the respondent represented to the Connecticut Legislature that the lease did not contain an understanding concerning the condemnation of petitioner's leasehold interest. (46A)

REASONS FOR NOT GRANTING THE WRIT

I. THERE WAS NO IMPAIRMENT OF THE STATE'S CONTRACTUAL OBLIGATIONS AND NO REVIEW IS APPLICABLE UNDER THE CONTRACTS CLAUSE OR THE TAKINGS CLAUSE.

Petitioner suggests this case presents an unresolved question applicable to a state's assessment of compensation for the taking of a right under a contract to which the state is itself a party. (Pet. 20) Petitioner is incorrect. There was no right taken under a contract by the State of Connecticut in this case. The State had the inherent power, under eminent domain, to take petitioner's leasehold interest. The State also had the right under the lease contract to calculate the damages in accordance with the contract and to pay to the petitioner, "as the award," the unamortized value of the leasehold improvements. Petitioner and respondent agreed in advance that, in the event of a condemnation, petitioner's award would be calculated pursuant to a prescribed formula. (Pet. 66a)

Such lease provisions are referred to as "condemnation" or "termination" clauses and are widely recognized as valid. Annotation, *Validity, Construction and Effect of Specific Provision of Lease or Statute Relating to Rights and Compensation of Lessee in Event of Condemnation*, 96 A.L.R.2d 1140 (Rev. 1987). Connecticut has adopted this reasoning and has clearly held that such a provision, which specifies the rights of the parties with regard to the condemnation award, is enforceable *according to its terms.* (Emphasis added) *Waesche v. Redevelopment Agency of the City of New London*, 155 Conn. 44, 50, 229 A.2d 352 (1967) citing 27 Am. Jur. 2d 22, Eminent Domain § 250; note 96 A.L.R.2d 1140, 1145 § 4; 11 McQuillin, op. ed. § 32.85, p. 465.

The Connecticut Supreme Court adopted this reasoning in this case (Pet. 35a, 36a), and further held:

"However inadequate the amount arrived at through the formula might appear in the absence of such an agreement an award made pursuant to the agreement cannot be regarded as an impairment of a contract." (Pet. 35a)

Furthermore, petitioner not only agreed to provisions contained in paragraph 28 when the original lease was executed, but during the term of the original lease there were at least three amendments agreed to and there is no indication that petitioner sought to have the language in paragraph 28 changed or modified. (Ex. C, D, G) (Tr. Sep. 2, 1986, 10, 12, 26) In addition, petitioner signed another agreement with respondent in the form of a Stipulation (Pet. 53a) in 1982, over a year after the change was made to General Statutes, Section 13b-42(e) (Pet. 5) (22A, 23A), which agreement triggered the operation of paragraph 28 when petitioner agreed with respondent that the date of the anticipated condemnation would be deemed to be August 30, 1982 — a date which would bring the condemnation within the initial term of the lease. (Pet. 11, 12, 55a) (23A) It is interesting to note that at the time the Stipulation was signed, respondent was represented by an attorney and the president of the petitioner, Daniel J. McCauley, was also an attorney-at-law and a member of the bar of New York State. (Tr. Sep. 2, 1986, 2)

Finally, this Court has jurisdiction under the impairment clause only when the state court has given effect to a legislative enactment which impairs the obligation of a prior contract. *Winona & St. Peter Railroad v. Plainview,* 143 U.S. 371, 392, 12 S.Ct. 530, 36 L.Ed. 191. The judgment of the state court must rest on the statute either expressly or by necessary implication. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 350, 22 S.Ct. 691, 46 L.Ed. 936. No such conditions exist in the present case. The state trial court relied on the condemnation clause (paragraph 28) of the original lease contract and the stipulation agreement, signed by the parties, to assess just compensation for this taking. (Pet. 52a) The petitioner has no claim under the contracts impairment clause.

II. THE COMPENSATION AWARDED PETITIONER BY THE STATE WAS THE COMPENSATION REQUIRED UNDER THE LEASE AGREEMENT AND THE STIPULATION SIGNED BY THE PARTIES AND ACCORDINGLY IS NOT PATENTLY INADEQUATE.

The State's conduct here was in accordance with the provisions of the two agreements signed and executed by the petitioner along with the respondent. Petitioner cannot now claim harm when the calculation of the compensation was previously agreed to. Furthermore, with all the arguments made by petitioner, if a condemnation occurred during the original term of the lease, paragraph 28 would dictate the amount of compensation petitioner would receive regardless of which agency condemned the leasehold. (29A, 31A, 32A) (Pet. 17a, 36a) Petitioner agreed in the stipulation (Pet. 55a) that the condemnation would occur during the original term of the lease, and therefore, petitioner triggered the operation of paragraph 28. Petitioner cannot now claim the award is inadequate, fundamentally unfair and violates the Takings Clause and the Fifth and Fourteenth Amendments. (Pet. 31a, 35a)

This Court has consistently refused to consider claims that condemnation awards are inadequate. *O'Brien v. Public Service Commission*, 251 U.S. 537, 40 S.Ct. 55, 64 L.Ed. 402; *Puget Sound Traction, Light & Power Co. v. Newell*, 246 U.S. 649, 38 S.Ct. 315, 62 L.Ed. 920; *Sioux County v. Rule*, 241 U.S. 640, 36 S.Ct. 285, 60 L.Ed. 1216; *Consolidated Turnp. Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 33 S.Ct. 510, 57 L.Ed. 857, *Glos v. Chicago*, 226 U.S. 599, 33 S.Ct. 112, 57 L.Ed. 375.

CONCLUSION

The award of compensation for this taking was made in accordance with the terms of two agreements executed by petitioner with respondent. Petitioner entered into these agreements freely and without undue influence. When the stipulation was agreed to, the General Statute, which petitioner claims was enacted to impair the contract petitioner had with the State, was passed by the state legislature more than a year before the Stipulation was signed. Petitioner was represented by an attorney and one of the officials of the petitioner was also an attorney when the stipulation was signed. When the original lease contract was signed, a careful reading of paragraph 28 would have indicated that the State's taking of the leasehold was contemplated. Intent of the parties is determined by the language used in the agreement. Accordingly, petitioner was bound to its agreement of the August 30, 1982 condemnation date, which, in turn, required the computation of damages in accordance with paragraph 28.

There is no foundation for this Court to assume jurisdiction in this matter. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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TRANSCRIPT OF HEARING BEFORE CONNECTICUT SUPREME COURT, OCTOBER 14, 1988, BRADLEY FACILITIES, INC. V. J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION, ET AL., DOCKET 13458 . . . 1A

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DOCKET 13458 : STATE OF CONNECTICUT

BRADLEY FACILITIES INC. : SUPREME COURT

VS

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION, ET AL : OCTOBER 14, 1988

ARGUED BEFORE:

THE HONORABLE ROBERT J. CALLAHAN
THE HONORABLE ARTHUR H. HEALEY
THE HONORABLE T. CLARK HULL
THE HONORABLE DAVID M. SHEA

APPEARANCES:

FOR BRADLEY FACILITIES INC.:
WILLIAM LAPINE, ESQ.
THOMAS CASONE, ESQ.

FOR J. WILLIAM BURNS, ET AL:
MICHAEL J. LOMBARDO, ESQ.

MR. LAPINE: May it please the Court, I'm Lawrence Lapine. With me is Thomas Casone. We represent the Plaintiff Appellant, Bradley Facilities, Inc.

This is an appeal from a condemnation appeal, quite a unique appeal since the condemning authority in this instance and the landlord of the leasehold which was condemned are one in the same, the State of Connecticut.

Bradley Facilities, Inc. is a consortium of air freight carriers. The corporation was formed expressly for the purpose of constructing an air freight facility at Bradley International Airport in 1961. My client entered into a lease with the State of Connecticut and did construct an air freight

facility in 1962. The lease was to run twenty years from the date of completion, into 1982. It also carried with it two five-year options to extend that lease at an unspecified sum of money.

In 1975, the parties amended the lease. The Plaintiff in consideration of releasing some land that was under the lease, received a specified sum in rental for the two five-year option periods.

In 1985 (sic), the State of Connecticut was undergoing or considering an expansion project at the airport and determined that they would need the air freight facility of my clients. They would have to demolish it in order to make room for the expansion.

They determined around '79, in looking at the lease, that there was a condemnation clause in the lease, Article 28. The State determined —

JUSTICE HEALEY: Who drew that lease, sir?

MR. LAPINE: The State of Connecticut drew the lease.

The State determined, the DOT determined or believed that there was a condemnation — the formula in the condemnation clause would afford the State of Connecticut the ability to take a leasehold a pay us a minimum amount of damages, if any.

However, they also concluded that the State did not have the statutory authority in 1981, or, since 1961, to condemn its own leasehold interests and then, unbeknownst to us, went to the Legislature and drafted and lobbied and eventually succeeded in getting fourteen — I'm sorry — getting the condemnation provision 13b-42e passed, which afforded them the opportunity to condemn their leasehold interest.

In 1982 or 1981, they notified us that they intended to condemn the property within the original term of the lease. We sought an injunctive action in the Superior Court in Stamford on the basis that the State had no need for our building at that time, and, in fact, the only reason why they intended to condemn the leasehold interest in 1982 was an attempt to bring it within this formula in Article 28 of the condemnation clause.

JUSTICE CALLAHAN: Excuse me, Mr. Lapine. Was there any provision in the lease for a total taking during the option periods?

MR. LAPINE: Addressing the total taking during the option period? No, there was not. Of the demised premises, no, there was not.

We stipulated in Stamford to the effect, among other things —

JUSTICE SHEA: There was a provision or it was simply a very standard condemnation clause, I understand.

MR. LAPINE: Absolutely.

JUSTICE SHEA: In other words, it didn't actually, obviously, authorize any action by itself, you'd have to have a statute. Is that right?

MR. LAPINE: Yes. The condemnation clause was a standard condemnation clause between a landlord and a tenant and —

JUSTICE CALLAHAN: Apportioning damages.

MR. LAPINE: Excuse me?

JUSTICE CALLAHAN: Apportioning damages.

MR. LAPINE: Apportioning the award of the damages. It didn't fix damages, it apportioned sharing of the damages.

JUSTICE SHEA: Let me ask you one thing. 13b-42e, the statute you previously referred to, was that enacted before or after the exercise of the options?

MR. LAPINE: It was enacted after the exercise of the option. It was enacted shortly before they notified us of the condemnation. The options were exercised in 1979. The statute, I believe, was created in — 42e — was in 1981. And that statute was enacted specifically addressed to these two lease — to the lease of Bradley Facilities, Inc.

We had stipulated in Stamford that the condemnation, the injunction action would be dropped, the State would not proceed with its condemnation —

JUSTICE HEALEY: Excuse me. When you say it was enacted specifically with reference to the facilities at Bradley, was this a general statute or a special act?

MR. LAPINE: No, it was a general statute, but the legislative history clearly shows and the Defendants admit —

JUSTICE HEALEY: That that was the only purpose.

MR. LAPINE: — that was the purpose. That was the sole purpose, this leasehold —

JUSTICE HULL: The Commissioner came in and said they needed this, didn't he? Commission of Transportation, as I recall?

MR. LAPINE: Yes, came in and said they needed this statute because of Bradley Facilities, Inc. lease.

The stipulation stated that if the State did condemn, that we would agree that they could use as a condemnation date

August 31st, 1982, so they can make their argument about the applicability of the formula.

That's all we stipulated to, and, in fact, stated that we were not waiving any of our rights to an award and that we were not agreeing with or acquiescing to the State's position as to damages. As we felt in 1982, it came to pass that they did not need the property until 1984 and it was July, 1984 that we vacated. It was July, '84, or, April, '84 that the notice of condemnation —

JUSTICE HULL: Wasn't that one of your purposes in the stipulation, to get a couple more years of possession of the facilities?

MR. LAPINE, Not exactly, Justice Hull. Our major objective was we didn't think — they didn't have the funding in 1982. We thought that they may not need, they may not get to the position where they needed our building. Obviously, we knew we would get a couple more years, but we felt, number one, that it may not come to pass, and, quite strongly, number two, is that we didn't agree with the State's position at all with regard to damages. We didn't agree in 1982 we didn't agree at the trial level, and this is the basis of our argument before this Court, is that we do not feel that the condemnation clause even applies. Firstly, because the condemnation clause doesn't set an award. It's only because the State is a landlord that they can make the argument. But a condemnation clause is the sharing of the award, not the setting of the award.

And I should state that in 1984, the facility was fully rented. We were grossing three hundred thousand dollars a year. We were netting two hundred and twenty-five thousand dollars a year and we had eight years left to run.

That lease wasn't worth a dollar or worth a hundred and forty-five dollars; it was worth a million dollars and the State knew it and their own documents showed it. They had set aside a million dollars for this lease.

So, the formula in Article 28 of the lease is contrary to the long-standing rule of this Court of how do you set damages for the condemnation of a leasehold interest. Actually, it's how do you set damages when you determine how much a tenant can share in the fee owner's condemnation award and it's the economic rent less the contract rent and that difference times the number of years left to run on the lease. That's how you determine damages of a leasehold interest.

So, our first argument is, and at the trial level, is this article in the lease, is it relevant for this hearing? Because that isn't how you set damages. As in the Giglioti (phonetic) case and the Barini (phonetic) case, this Court clearly established how you set damages.

If the State claims that they can share in our leasehold interest, they can go under 48-21, which is a separate hearing where the Court determines the division between the condemnation award.

So, we said, Well, I don't see how the State can claim they can share in our award for a leasehold interest, but if they make that claim then it should come at the appropriate time. This is a million dollar lease; make the award for a million dollars and then let the State move to see if they can share in that award.

Even if you get beyond that, though, the clear reading of the condemnation award shows — the condemnation clause — shows that it doesn't apply in this case. First off, the condemnation clause addresses a number of situations that can exist. The State hung it's hat on a formula —

JUSTICE HULL: Page, please? Can you refer me to —

MR. LAPINE: Page of the lease? It is —

JUSTICE HULL: I mean of what we have before us so I can look at what you're talking about.

MR. LAPINE: All right, Your Honor. In the record, it's page twenty-one.

What the State saw in 21 is the term, the original term of the lease. I think what they overlooked were the first words, "In the event that the entire demise premises were taken by condemnation." The demise premises have not been taken by condemnation —

JUSTICE SHEA: When you take the lease, isn't that the entire demised premises?

MR. LAPINE: No, it's —

JUSTICE SHEA: Isn't that a reasonable interpretation?

MR. LAPINE: No, it isn't and I will tell Your Honor why. It's because there is a — number one, there is a provision in the lease, if you'll go to the last paragraph on page three starting with, "If at during the original term of the lease or extended, the whole or part of the demise premises or of the building or of the tenants' interests is taken temporarily by condemnation."

So, the lease itself, Justice Hull, distinguishes between demise premises and the tenant's interests, as does the law. The cases state the demise premises means the fee interest and that was our point at the trial level. The demise premises are owned by the State. After the condemnation of a leasehold interest, it's still owned by the State and the formula further points that out because the formula, one of the points of the formula is, what the formula consisted of is you take the tenant's improvement, cost of improvement, cost of putting up the building, and then you multiply it by two fractions, one of which is the time left on the lease over the amount of days in the original lease. But, the words are, the time that title vests.

No title vested in this condemnation because if you read the — again, the opening sentence, it says in the event there's a condemnation of the demise premises, the lease terminates. So, how could —

JUSTICE HULL: Why can't you read demise premises and, not in a physical sense, but as referring to the leasehold interest?

MR. LAPINE: Can you read it in that fashion?

JUSTICE HULL: Why doesn't demise premises mean simply the leasehold interest of the tenant that is being condemned?

MR. LAPINE: Well, I'm saying it does not in this instance, and I would say in any instance, because a leasehold interest is the right to use the demise premises. It isn't the demise premises, number one, and the whole concept of this clause as in any condemnation clause in a lease, is to limit the tenant's sharing when the owner loses his property by condemnation. That's the purpose. The owner wants the entire award or wants at least a defined set of the award, to limit the tenant's interest. That's the purpose of this condemnation clause.

The State of Connecticut didn't lose anything in this condemnation. They still own the property, both before and after the condemnation. They hadn't suffered any damages.

And if one — if you continue with the paragraph I jumped to, Justice Hull, it's —

JUSTICE HULL: And what page is that on?

MR. LAPINE: It's the same one, page three, we're back to where that paragraph that I said distinguished the demise premises from the tenant's interest, that portion of the condemnation clause provides that if the tenant's interest is

taken, then the tenant's obligation to the State continues, that is, to pay rent, but the tenant gets the entire award. Which, it makes sense, because, again, the landlord hasn't lost anything. The landlord continues to get the benefit of the lease bargain, that is, his rent, while the tenant who's lost the leasehold interest, gets the entire award.

So, the State, or the landlord in this instance, is not damaged. And, so, the condemnation clause, if you apply it at all, takes into consideration the fact that if a leasehold interest is taken, it's the tenant and not the landlord that gets the award, provided the landlord's rent continues to be paid.

JUSTICE CALLAHAN: That whole section of the lease would not apply at all if the State of Connecticut was the condemnor, right?

MR. LAPINE: If they — they are the condemnor —

JUSTICE CALLAHAN: I know. But that section of the lease doesn't make sense if the State of Connecticut is the party who is doing the condemnation.

MR. LAPINE: Absolutely. It doesn't make sense at all. If you just read the language of it and —

JUSTICE CALLAHAN: And yet it seems to follow along with the first part of the — the first part of the lease and there doesn't seem to be any radical shift in gears between the first section of the lease and the second section.

MR. LAPINE: Of the condemnation clause?

JUSTICE CALLAHAN: Of the lease. There doesn't seem to be any — in other words, what I'm saying is the second section of the lease, at the bottom of page three here, doesn't make any sense if the State of Connecticut is the party who is doing the condemnation. Is that right?

MR. LAPINE: Well, it does make sense. Whoever the condemning party is, it does make sense, whether the State is the condemning party or the landlord. That's the problem, you have to make a distinction.

JUSTICE CALLAHAN: Yes, but in that situation the State wouldn't get the entire award, they'd be giving the award to themselves is what I'm saying. If you were going to write the condemnation clause intending it to be read the way the State wants it read in this situation, you would not have this clause in here.

MR. LAPINE: Exactly.

JUSTICE CALLAHAN: And there doesn't seem to be any radical shift of gears between the first part of the section of the lease and this part.

MR. LAPINE: Because it was never intended that the State would be the condemning authority.

JUSTICE HULL: Wouldn't you agree that it is at least ambiguous on this fundamental question that you and Justice Callahan are now discussing? It's at least ambiguous?

MR. LAPINE: I'd state it isn't ambiguous.

JUSTICE HULL: You think it's crystal clear?

MR. LAPINE: For two reasons. Number one, the lease has to be read in light of the law that exists at the time it was entered into. That's Black letter law, that the law of the land is incorporated as part of the lease. The law of the land —

JUSTICE HULL: Isn't that the most fundamental nitty gritty issue in the case?

MR. LAPINE: I think you can take any one of these, Justice Hull, and I find it fundamental and nitty gritty. I think

it's ironic because we can make any one of those arguments, that the law of the land at the time the lease was entered into, the State couldn't condemn.

JUSTICE HULL: All right, what's the other one? You said there were two reasons it's so clear; I don't want you to lose your train of thought.

MR. LAPINE: Just reading the condemnation clause. If you say, okay, there was, there was the law of the land, if you read the condemnation clause, it doesn't work. The formula doesn't work. The one section that does work is when it says the tenant's interests is taken. That works very well because that's what happened here and the State doesn't share in it. But, for nineteen years, during the course of this lease, the State didn't have a right to condemn its own leasehold interest. It was intended for a Federal takeover. The State of Connecticut knew it was intended for a Federal takeover. There are memorandums that preceded the —

JUSTICE HULL: They're not part of the record, are they?

MR. LAPINE: They're exhibits.

JUSTICE HULL: Are they?

MR. LAPINE: Yes.

JUSTICE HULL: There was an evidentiary hearing on this question of intent, on the question of whether or not there was some contemplation that this clause would be limited to a Federal condemnation, was there? In other words —

MR. LAPINE: It came out at an evidentiary hearing. One of our claims was, is that this is totally inequitable to being with because the State knew it was pertaining to a Federal takeover. So, that intent did come out; maybe not in the context of what was the intent of the section, but there are

memorandums from the Department of Transportation counsel to the various —

JUSTICE SHEA: Justice House didn't find that that was the intent, that it was to be a Federal condemnation, did he?

MR. LAPINE: I don't think Justice House addressed it, Your Honor.

JUSTICE SHEA: So it's not a fact in the case before us, even though there are memoranda in existence. The facts are only something found in the case, admitted or judicially noticed.

MR. LAPINE: Well, I agree with that. We asked for a rectification —

JUSTICE SHEA: And what happened? I can't remember.

MR. LAPINE: The only thing that Judge House rectified was he admitted that all the arguments that we're raising before this Court and in our brief was raised at the trial level. We asked for —

JUSTICE HEALEY: He said that all the claims of law you said you made below, you made before him.

MR. LAPINE: Yes.

JUSTICE HEALEY: That's all.

MR. LAPINE: Right. But we also — the rectification is in — our request for it is on page 31 and specifically it —

JUSTICE SHEA: C? 1-C?

MR. LAPINE: Thirteen, page 34, where we say that the Defendants knew that the condemnation provision pertained to a Federal condemnation.

JUSTICE SHEA: And what'd he do with that?

MR. LAPINE: He didn't include any of our request of facts in it. You'll see, there are three exhibits and those exhibits, every one of those exhibits say from the counsel of DOT that this provision was intended to address a Federal takeover, and said — otherwise the language doesn't make sense, and that at the same time, those memorandums also say, we don't have the legislative authority to condemn our leasehold interest, so let's go get it.

JUSTICE SHEA: But aren't we stuck — I don't mean stuck — aren't we bound by Justice House's finding and failure to act on the rectification?

MR. LAPINE: Well, we then moved to have — after Judge House refused to rectify, then we requested the Court compel him to rectify it.

JUSTICE HULL: Of course, this Court can always sent it back for further articulation if we think that's necessary —

MR. LAPINE: We asked for further articulation of the Appellate Court and we did not get it. After Judge House refused to include these undisputed facts, we asked that —

JUSTICE HEALEY: Did you ask that they order him to articulate? Is that what — what did you do?

MR. LAPINE: Justice Healey, I think the sequence was we asked for — obviously, you see our request for an articulation rectification. Judge House's response is typed on the bottom of page — the last page, page 36. I think we then went to the Appellate Court to ask that he be compelled to articulate.

JUSTICE HEALEY: And they denied it?

MR. LAPINE: They denied it.

JUSTICE HEALEY: I see.

JUSTICE HULL: You didn't seek review of that denial.

MR. LAPINE: We didn't seek review. We didn't seek review.

JUSTICE HULL: So, as I said before, you're stuck within the confines of the record before us.

MR. LAPINE: Well, I —

JUSTICE HULL: We can't go as a fact that this was only intended to apply to a Federal condemnation in light of our discussion over the last three or four minutes.

MR. LAPINE: Well, I think I can make that argument, Justice Hull, just on the basis of the language of the — the language of the condemnation —

JUSTICE HULL: Well, that's a different matter.

MR. LAPINE: — and the legislative history —

JUSTICE HULL: That's a different matter.

MR. LAPINE: — and the legislative history of the act.

JUSTICE HEALEY: In other words, by deduction, deduction, you're saying they didn't have the power until '81, as a State, to condemn, ergo the only condemning authority prior to '81, and at the time the lease was originally signed, was the Federal government. Is that the situation?

MR. LAPINE: That's the only —

JUSTICE HEALEY: Yes, sure. Sure.

MR. LAPINE: — that's the only authority I would know of that could have condemned this. Maybe there are others. I know the State didn't have it and that's our point.

JUSTICE HEALEY: The state of the law, the lack of the power to condemn, and also the language of Article 28 itself, as a matter of law, your position is that Justice House erred.

MR. LAPINE: Absolutely. Our argument that I'm making today, I made at the trial level and I think as a matter of law, Justice House, there was really no dispute in fact; as a matter of law, Justice House should have found in our

arguments that the condemnation doesn't apply to fix damages and that this specific provision doesn't make sense and doesn't apply. And, also, the legislative history that at the time of the entering into the lease, there was no law or authority for the State to condemn its leasehold interest, and, therefore, it would be unfair and improper —

JUSTICE SHEA: Let me ask you this. If there had been a Federal condemnation rather than State condemnation, what would the difference and result have been mathematically here? In other words, you'd have, I guess, basically a larger award against which this fraction would be multiplied against, is that true?

MR. LAPINE: Justice Hull, the question is, what —

JUSTICE SHEA: I'm Justice Shea.

JUSTICE HULL: He's the better looking one, that's how you tell us apart.

JUSTICE SHEA: Flattery won't help.

MR. LAPINE: I'm sorry, Justice Shea. The issue — the question, before I can answer it, what is the Federal government condemning? If they're condemning the fee interest of the demise premises, then the formula would come into effect. The condemnation here, as stated in the condemnation documents, was for the leasehold interest. Under — if the Federal government condemned our interest, our leasehold interest, we would be entitled to the entire award less what we have to pay the State for our rent. It's right in on page three.

JUSTICE CALLAHAN: But, if the Federal government had condemned under the exact same circumstances here on the 31st of August and condemned the entire demise premises, you would have been right where you are now.

MR. LAPINE: If the Federal government had condemned the entire demise premises?

JUSTICE CALLAHAN: Yes, and during the term of the original lease.

MR. LAPINE: The formula would come into effect. We concede that.

JUSTICE CALLAHAN: Yes, okay, I just want —

MR. LAPINE: We concede that.

JUSTICE CALLAHAN: I understand that. It's your position as a matter of law, 28 did not apply.

MR. LAPINE: Absolutely, because, A, the entire demise premises wasn't condemned.

JUSTICE SHEA: But, getting back to my question, that's — in other words, if there had been what you contemplated, at least according to your claim, the formula would still be applicable as contained in the lease, but it would have been applied to an award which would have been a great deal higher because of the fact that the government wouldn't be taking both the fee and the leasehold, is that right?

MR. LAPINE: No, I don't think — no, our award wouldn't have been any larger, because the sharing —

JUSTICE SHEA: Well, I'm a little confused then. How would you be prejudiced if you say the total award — obviously, this condemnation clause contemplates, under your theory, that the Federal government might come in and condemn the whole property which at the time of its demise to your client as a leasehold, and whatever the number they decided, they would, of course, put that on the total value of the land and facilities that were being taken and then this clause would come into play to apportion that award based upon the value of the leasehold interest.

Isn't that basically what you — what this clause, according to your claim, was designed to do?

MR. LAPINE: Yes, the clause was designed, if the fee was taken, if the demise premises was taken, then our share of that award would be determined by this formula which is predicated on our investment and the amount of days left in the original term of the lease, if it was done during the original term of the lease.

JUSTICE SHEA: So your position, even if we were to adopt it, would be not that the clause falls entirely out of the

picture, but that in applying the clause fairly you would have to hypothecate an award for the value of the whole land and then decide what the value of the leasehold interest was in relation to that. Isn't that right?

MR. LAPINE: No, Justice Shea, not under these circumstances. If the State took the leasehold interest, that's the notice of condemnation. It's the leasehold interest.

JUSTICE SHEA: I understand that, but, basically, your claim of the unfairness of this clause is based, as I see it, upon your claim that this is only planned where some third party such as the Federal government would exercise the condemning authority. In that event, they would not only take the leasehold interest, they would take the fee. Isn't that right?

MR. LAPINE: No, Justice.

JUSTICE SHEA: No?

MR. LAPINE: I'm not saying the clause is unfair. I'm saying the clause was misapplied. I'm saying that — I think what you're driving at, Justice Shea, is that we'll get more money — we feel we would get more money if the fee and the leasehold were condemned together. That's not the case. I'm sorry —

JUSTICE SHEA: I don't know whether you would or not. I just wondered how that would work out because it appears that your claim is based upon the idea that this clause, from the way it is drawn, and from the status of the law at the time the lease was entered into, never contemplated a condemnation by the State, but contemplated a condemnation by the Federal government, and, in that event, in the event of a condemnation by the Federal government, the Federal government undoubtedly would have taken not only the leasehold, but also the fee. They would have taken the State's interest in the property and they would have arrived at a number which corresponded to the value of that — of what was the State's interest. They would have arrived at — they would have condemned it at the value of all of the facilities taken, which would necessarily include the leasehold, and then, at that point, this clause would come in to apportion that award. Isn't that the way you would construe this clause?

MR. LAPINE: If the fee was taken. But, you're surmising that if the Federal government had to take the fee —

JUSTICE SHEA: Yeah, in other words, your claim is that that is what was contemplated. That's what the purpose of this clause was. You never contemplated the taking of a leasehold all by itself.

JUSTICE HEALEY: You have about two minutes left, sir.

MR. LAPINE: Oh, absolutely. Absolutely. The condemnation clause provides for that. It says if the tenant's interest is taken, then the award will not be shared with the State of Connecticut except for the rent. So, that was contemplated, Justice Shea. It wasn't that the only event in which this condemnation clause would be effectuated or activated is if the Federal government took the fee interest. No. It also provides for the Federal government taking the fee interest for a temporary time or taking the building or taking the tenant's interest. So, it did contemplate that. And, that's our point. Here the tenant's interest was taken, the leasehold interest was taken, so the formula has no bearing whatsoever. We'll jump down —

JUSTICE SHEA: Well, supposing the Federal government took just the leasehold interest, as you say, and that was contemplated and decided that that was worth a million dollars, why wouldn't this formula still apply in apportioning that award then?

JUSTICE HEALEY: Before you answer that, I indicated a few minutes ago you had about two minutes, so, go ahead.

MR. LAPINE: Fine. Why? If they said it was worth a million dollars, why wouldn't the formula apply? Because the formula — the condition precedent for the formula is a condemnation of the demise premises, meaning —

JUSTICE SHEA: And the demise premises is an ambiguous term which can be construed to mean taking the fee itself or it can be construed to mean taking the leasehold interest.

MR. LAPINE: Not in this clause, Justice Shea. I disagree. It is not ambiguous whatsoever and that's because the clause distinguishes between demise premises. It says demise premises or tenant's interest. That's distinguished. The construction law is that when those terms are used in the same paragraph or the same clause, they have to have different meanings, and they do have different meanings. I don't claim it's ambiguous at all, not in the least. I won't agree with that with respect, maybe generally, but certainly with respect to this clause. This clause itself makes a distinction, Justice Shea, between demise premises and the tenant's interests.

JUSTICE HEALEY: That just about uses up your time, sir. Thank you very much.

Mr. Lombardo.

MR. LOMBARDO: Good afternoon, gentlemen, I'm Michael Lombardo, Assistant Attorney General representing the Department of Transportation.

JUSTICE HULL: Did you draft this agreement?

MR. LOMBARDO: No, I did not, Your Honor. That was drafted in 1961 and I wasn't around then. I wasn't around in the Attorney General's office.

JUSTICE CALLAHAN: You were alive then, though.

MR. LOMBARDO: Yes, I was, Your Honor, but I was — at that time I was probably controller of a steel mill in Willimantic, in 1961.

In any event, a couple of things. The record, the memorandum of decision which is page twenty of the record, page two of the memorandum, indicates that the option agreements were exercised in 1969. It's really 1979 and the transcript will prove that. I just wanted to call attention to that date because it's quite important.

And, secondly, the Plaintiff, Bradley, did ask the Appellate Court —

JUSTICE CALLAHAN: Why is that important if —

MR. LOMBARDO: I'm sorry, sir?

JUSTICE CALLAHAN: Why is that important if the — if 28 is construed as Mr. Lapine advocates it be construed, the option periods would be considered whether it was exercised or not, wouldn't it?

MR. LOMBARDO: Because the record shows, and also in the briefs, there's indication that Bradley Facilities was told by the Department of Transportation that they were — that the Department of Transportation was going to terminate their lease and they immediately exercised the options and I think the posture of the case, that would indicate what the posture of this case really is, that they were trying to get an extra eight or ten years on the term in order to come into the Court and say, "We are due a million bucks for an option period." And I think it's important that this Court consider and determine what Bradley Facilities was really doing in this particular case.

They signed two contracts. They signed a lease agreement and they signed a stipulation and they knew what they were doing. They come into this Court and they've been in to the Trial Court. I've heard this same litany over and over again. It's been recited several times in the Trial Court and based on two agreements. Now they want this Court to say, No, let's ignore those agreements and let's give them their million dollars based upon the eight year period left in the options.

JUSTICE CALLAHAN: What two agreements are you talking about? The lease and the stipulation?

MR. LOMBARDO: Pardon?

JUSTICE CALLAHAN: What two agreements? You're talking about the lease —

MR. LOMBARDO: I'm talking about the lease and stipulation —

JUSTICE CALLAHAN: — and the stipulation?

MR. LOMBARDO: — and both of those agreements, signed by the parties with full knowledge of the events, control the action in this case.

Bradley Facilities states — they said the State did not have authority to condemn that leasehold interest in 1961. That is not true. The State has always had an inherent right to condemn property. The fact of the matter is, this Court addressed that very issue as far back as 1847 and I found a case, Clark versus Saybrook, 21 Conn 313 and at page 324 this Court said that the State has an inherent right to condemn property and the people have delegated that right to the legislature. And following on to the cases up to —

JUSTICE SHEA: But I gather that until this statute previously referred to was passed, that's 13b-42e, the Department of Transportation had no authority to —

MR. LOMBARDO: That's correct, Your Honor, but the State did and all the Commissioner of Transportation had to do was go to the legislature and ask for a special act to pass to condemn that building. The State had the right to condemn that building and the fact of the matter is in 1941 —

JUSTICE SHEA: So you're saying that we read into the lease not only the laws existing at the time the lease was executed, but also any laws which might be enacted in the future, is that right?

MR. LOMBARDO: Well, the law that was enacted that was referred to in this Court this morning, 13b-42e, was simply an enabling statute that enabled the Commissioner of Transportation to perform the act of condemnation as opposed to the Legislature. They merely delegated their authority with that statute by passing —

JUSTICE HULL: Does the legislative history back up this narrow interpretation you give to that?

MR. LOMBARDO: I have cases. The fact of the matter is, in 1941, the —

JUSTICE HULL: In the record? In the record? In the legislative history that's in the record before us?

MR. LOMBARDO: No, the case I'm citing now? No, I'm —

JUSTICE HULL: Well, I'm sorry I asked about it, then. We can't go beyond the record.

MR. LOMBARDO: Well, Your Honor, the case that I'm referring to, this is case law, the Town of Danbury in fact did condemn a leasehold interest of the Danbury Airport Corporation and that was in 1941 and that's reported in 9 Conn. Sup 320. In that case, the Court said the Plaintiff merely seeks to break — the claim of the Defendant was that the Plaintiff was wrong because Plaintiff merely seeks to break a lease given by the Plaintiff to the Defendant, and the Court said, "So what? If that's what happens, that's what happens," and that a leasehold interest is property subject to condemnation under the inherent powers of the sovereign to condemn property. And the Courts have addressed this problem.

JUSTICE HEALEY: So, it's your position, sir, on this that the Clark case, that old case, was built into the lease when this was executed, is that —

MR. LOMBARDO: What was the law of the land at the time the lease was entered into. Bradley's coming here —

JUSTICE HEALEY: No, that's your position, okay.

MR. LOMBARDO: I'm not just saying the Clark case, Your Honor, but a series of cases throughout the years. The fact of the matter is there's an excellent case in 1952, New England Gas Transmission versus Collins, that had a tremendous discussion of inherent right of the State to condemn property, and that's 138 Conn 582, a 1952 case. And at page 586, the Court went on to discuss the fundamental principle of law, that the power to appropriate private property for public use is an attribute of the sovereign and essential to the existence of government. It lies dormant in the State until set in motion by legislative enactment.

And the Bradley Facilities would have or could have been fully aware of the law of the land and I submit to this Court that Bradley Facilities knew what the law was when they signed that lease agreement. They certainly knew what the law was when they signed the stipulation because the Public Act in 1981 was passed which created 13b-42e. That was

passed in August of '81. The stipulation was signed in August of '82, so, even at the time they signed the stipulation, they were fully aware that condemnation could take place.

JUSTICE SHEA: Well, that stipulation, do you claim anything, that that did anything more than establish the date of the condemnation?

MR. LOMBARDO: It did more?

JUSTICE SHEA: No, do you claim that it did anything more than establish the date of the condemnation —

MR. LOMBARDO: No, I'm not claiming it did anything more. I'm simply claiming that it established a date and the purpose of establishing the date of August 30th, 1982 was clear to all parties. And, the fact of the matter is, there's testimony in the case by witnesses for Bradley —

JUSTICE CALLAHAN: And what was that purpose? To establish the date of condemnation or was it —

MR. LOMBARDO: Establish the date of the condemnation, to bring it within the initial terminal lease agreement.

JUSTICE CALLAHAN: But the stipulation did not in any way indicate that Bradley concurred in your view of Article 28 in the lease, did it?

MR. LOMBARDO: Article 28 had to — they had to agree to that because if it was brought in during the original term of the lease agreement, Article 28 had to apply. The second portion of Article 28 could not apply because if you read the second portion, it states that if this is a partial taking, the lease shall continue in effect and in this particular case, the lease did not continue in effect. This was not a partial taking of a leasehold interest. This was a total takeover of the leasehold interest and, furthermore, they argue that the term demise premises and leasehold interest are not one in the same. Yet, on page one of the lease, demise premises is defined as being a leasehold interest and that was part of the contract as well.

So, the terms of the lease and the terms of the stipulation clearly indicate to all parties, including Bradley Facilities that the State intended to condemn on the next to the last day of the lease in order to bring the condemnation within the initial term of the lease agreement so that Article 28 would apply and that all Bradley would get would be the unamortized value of the leasehold improvements and that's consistent with the principles of accounting. It's consistent with —

JUSTICE HULL: Do you think they understood that's all they were going to get, a hundred and forty-six dollars?

MR. LOMBARDO: Your Honor, if any accountant, any individual knowledgeable in business would know that if you read that clause, that all they were entitled to, and this is the principle of accounting, if you have a leasehold interest and you make improvements on the leasehold, you have to amortize those improvements over the terms of the initial lease, not during the option period in the initial lease because they must be written off during the initial lease. Nobody can really anticipate whether the option periods are going to be exercised or not.

JUSTICE HULL: And the dicker was they got two more years use of this but the State agreed to the date of condemnation. The State was able to get that to tie it within the original term, right?

MR. LOMBARDO: Absolutely. The State got the original date of condemnation and Bradley got two additional years of occupancy.

JUSTICE HULL: Isn't that the essence of the proposition here?

MR. LOMBARDO: It's what?

JUSTICE HULL: That's the essence of the deal that went down here?

MR. LOMBARDO: That's exactly it.

JUSTICE HULL: They got two more years, the State didn't get that eight years tacked on, right?

MR. LOMBARDO: And then when Bradley got their two years, they came into Court and said, "Court, foul, we didn't mean to do that, we want our million dollars based upon the eight years left in the option periods."

And the same argument was made at the trial level. It was analyzed. The fact of the matter is, we started trial in October and at that point, this issue was raised and we recessed and the Trial Court asked for briefs on this very issue, a demise premises as opposed to leasehold interest, and the Court had the briefs and then we resumed trial again in February after all this consideration was made.

And even the motion for articulation, which was really denied by Judge — Justice House, rather. Then there was a motion for review filed with the Appellate Court and that motion for review was granted, but the relief requested was denied and I think that's important as well because the record will show what the posture is by — if the Court looks at this motion for review and the objection to the motion, I think the entire case is spelled out in those two documents.

But, nevertheless, also, the fact that Bradley insists that the State had no right to condemn the leasehold interest at the time the contract was entered, that is just simply not correct because the State has always had the inherent power to condemn all property.

JUSTICE SHEA: Let me ask you this: Your opponent, Mr. Lapine, claimed that at the trial there was some evidence that was presented in regard to, or that would indicate that what was really being contemplated and that the purpose of this clause at the time the lease was executed, was a possibility of a Federal condemnation. Now, what do you have to say about that?

MR. LOMBARDO: I say — the first thing I say about it is the evidence that was alluded to, Exhibits M, N and O, I believe, of the record, there were three memorandum back and forth between counsel and DOT officials, and the

memorandum said, I feel that if this clause applies, if the Federal government condemned the property, and there was some memorandum, some discussion, and the people in DOT said, We don't agree with you, or something of that nature. And tehre (sic) (there) was ano (sic) (no) official opinion written. There was no research done on it. It was just a memorandum back and forth between the counsel for the DOT and —

JUSTICE SHEA: So you challenged the weight of those exhibits, is that right?

MR. LOMBARDO: Absolutely, Your Honor. It was considered by the Trial Court. These letters were in evidence, they were before the Court.

The fact of the matter is, the attorney that wrote the memos was on the witness stand and he was questioned on the witness stand at the trial level and the Trial Court made the determinations. This is not a printout memorandum of decision. It's not a denial of a motion granted. This is a comprehensive memorandum of decision written in the Trial Court which covered all of the aspects of this case and the fact of the matter is the factual —

JUSTICE SHEA: Well, you say all the aspects, but as I — is there anything in the memorandum about this particular issue as to whether or not a Federal condemnation was being contemplated and that that was the purpose of this clause? Is there anything in the memorandum —

MR. LOMBARDO: There's nothing in —

JUSTICE SHEA: — of decision about that?

MR. LOMBARDO: — the memorandum that I remember mentioning the Federal —

JUSTICE SHEA: But you said that issue was raised in the Trial Court and now you said the memorandum was very comprehensive but there still is nothing that you can point to which indicates that this issue was even considered by the Trial Court.

MR. LOMBARDO: Well, it was raised in the Trial Court in argument, Your Honor, and it's raised this morning by Counsel and that's exactly what was done in the Trial Court. So, the Court was well aware that this argument was made. And, furthermore, —

JUSTICE SHEA: But it's not addressed. The Trial Court made no findings in that respect. You concede that.

MR. LOMBARDO: Not that I recall. But —

JUSTICE SHEA: And there was a motion filed for an articulation or for further articulation of the memorandum of decision which was apparently denied and I gather it did relate to this subject, is that correct?

MR. LOMBARDO: I don't remember whether the motion of articulation addressed the Federal question or not. I can't remember that.

JUSTICE HEALEY: Well, the Federal question was whether or not he would find as a fact that the Defendants knew that condemnation pertained to a Federal condemnation, paragraph 13, and he refused to find that as a fact. The claims of law that he suggests, that he indicates were made, which he states were made, do those include a claim about knowledge that a Federal condemnation was envisaged?

I'm looking at page thirty-four of the record where the claims of law are involved. Is it your position that this was —

MR. LOMBARDO: I have —

JUSTICE HEALEY: When you say it was raised in the Court below, paragraph Roman Numeral III, are the claims of law that Justice House said were raised. Now, is the knowledge of the Federal condemnation included in any of those claims of law that are made there? Or is it just in paragraph thirteen, as to the finding as a fact?

MR. LOMBARDO: I see paragraph thirteen says the Defendant knew that the condemnation provision pertained to a Federal condemnation.

JUSTICE HEALEY: And he refused to find that as a fact.

MR. LOMBARDO: Well, he didn't find any of the facts. He refused to find all the facts. He just — he said the question, the issues of law as raised were raised during trial.

JUSTICE HEALEY: Well, when you said the claim that only a Federal condemnation was envisaged, was raised in the Trial Court, do you mean as a claim of law or as a claim of fact?

MR. LOMBARDO: Well, Your Honor, just a minute, I think you said only a Federal condemnation. This doesn't say that. This says —

JUSTICE HEALEY: No, no, as I understand, Mr. Lapine said one of his claims is that because of the state of the law and because of his existing law argument, at the time the lease was signed that only a Federal type condemnation could be involved. You differ with that.

MR. LOMBARDO: That's the argument he's making today.

JUSTICE HEALEY: All right.

MR. LOMBARDO: But even if that is the argument, fine, but that was not what was requested in the articulation. In paragraph thirteen, he's asking the Court to find the Defendants knew that the condemnation provision pertained to a Federal condemnation. It didn't say only a Federal condemnation, number one, and —

JUSTICE HEALEY: Oh, all right.

MR. LOMBARDO: — number two, it doesn't make any difference. What difference would it make? Condemnation is condemnation and the State — the sovereign has the inherent power to condemn.

JUSTICE HEALEY: I understand your position is that there's the cases dating from 21 Conn down saying that the State has an inherent right to condemnation.

MR. LOMBARDO: Absolutely. And, furthermore, if the Federal — to answer the question earlier — if the Federal government did condemn, the damages to Bradley Facilities would be a hundred and forty-five dollars and thirty-eight

cents — a hundred and forty-six dollars and thirty-eight cents — still because of the operation of the agreement. It's an apportionment. Your Honor, —

JUSTICE SHEA: You're saying — I asked this question of Mr. Lapine and you apparently are saying that he wouldn't be benefitted if this had been a Federal condemnation.

MR. LOMBARDO: Your Honor, it wouldn't make any difference if the Federal government took that property for five million or thirty billion dollars. It wouldn't make any difference. All Bradley Facilities would be entitled to under the condemnation would be the unamortized value of the leasehold facilities. They had one day left on there to amortize the improvements made to that lease and one day's value, unamortized value, of those improvements was a hundred and forty-six dollars and thirty-eight cents. It was calculated by a CPA and there's no two ways about it. No matter what the damages were to the owner of the premises, the leasehold interest is worth the unamortized value and that's what they agreed to. It's a common clause in a lease, in the sharing of condemnation awards. It's not just in this lease, it's a very common clause. As I mentioned earlier, it's the principle of accounting.

JUSTICE CALLAHAN: Isn't that one of Mr. Lapine's points, that it's a common clause in proportioning condemnation awards, it does not contemplate the lessor condemning the lease itself?

MR. LOMBARDO: It does not contemplate the landlord condemning the lease.

JUSTICE HEALEY: Do you want to get back in front of the microphone, please? It helps us with the cassette if you stay there.

MR. LOMBARDO: I'm sorry, I have difficulty seeing over the microphone and hearing —

JUSTICE CALLAHAN: Isn't that his point, that it is a common clause where there is a condemnation by a third party, that 28 does not apply because it simply did not contemplate the landlord, the State of Connecticut, condemning the leasehold interest?

MR. LOMBARDO: That's his claim, but I don't think it's a valid claim, Your Honor, because the condemn — it says condemnation and condemnation is accomplished by the sovereign, whether it be the Federal government or the State governments and I just can't envision that anyone knowledgeable of the law or business activities would not contemplate that the sovereign State of Connecticut would condemn those facilities. And, as I said, a mere cursory review of the law would — indicates that it has even happened in the Town of Danbury.

JUSTICE CALLAHAN: Why would they talk about proportioning an award then? Why the State of Connecticut is not giving — the State of Connecticut's not getting anything here? Why would they talk about —

MR. LOMBARDO: Well, I can only guess about that and my guess is that — excuse me. In the State of Connecticut, buildings are owned really by the Commissioner of — it used to be Public Works and now it's Administrative Services — and in the statute it's indicated that he is really the — that the Commission owns all the facilities in the State and then —

JUSTICE CALLAHAN: And the State could have condemned and given the money to the Commissioner?

MR. LOMBARDO: Well, if they wanted to transfer some funds, I don't think that would effectively take place, but I can envision it happening. Well, it could happen because, for example, we have a building over in Wethersfield that was built with Federal money, the Labor Department building, and that building is under the control of the Commissioner of Public Works and so forth and so on, and, if it's condemned, then there could be some moving of money around.

JUSTICE CALLAHAN: Well, if that was intended, wouldn't it make a lot more sense to indicate if the State condemns the leasehold interest we will pay you X number of dollars in accordance with a certain formula.

MR. LOMBARDO: I don't think it was necessary to make that statement because —

JUSTICE CALLAHAN: Rather you think it made sense to word the clause in the way it was worded, which seems to contemplate a third party condemnation and an actual award?

MR. LOMBARDO: No. I don't think it makes any difference, Your Honor, because, as I mentioned, the intent of the clause is to give back to Bradley Facilities any value of the leasehold improvement that they did not use during the term of the lease. They made improvements of over a million dollars in 1961 and they had a a right to participate in that — in those improvements. If the time for participating in those improvements is extinguished because of time, for example, the expiration of the original lease or because of the condemnation, then all they are entitled to is the unamortized value of those improvements.

JUSTICE HULL: Mr. Lombardo, have you answered Justice Callahan's question? Why would the language have to be there for the State to have an apportionment of an award if it's the condemnor itself? Does that make any sense? It's talking about apportioning the award. Well, the State doesn't need any apportionment, the State's the condemnor. Isn't that very telling language against your position?

MR. LOMBARDO: In this particular case the State gets zero, but the leasehold interest — the party holding the leasehold interest still gets the unamortized value of their leasehold improvements. It doesn't make any difference how much money the owner of the fee gets, as I mentioned a moment

ago. It could be thirty million, it could be five hundred billion. All Bradley was entitled to is a hundred and forty-six dollars and thirty-eight cents, under any principles of construction of the agreement or accounting.

JUSTICE CALLAHAN: But doesn't the lease, the contract, doesn't the intent of the parties at the time it's entered into come into play and it (sic) (if) there was no intention, and the wording seems pretty clear that it was intended as a third — contemplated as a third-party condemnation — if the parties didn't have any intention as to what they would do if the State of Connecticut was the condemnor, does 28 apply at all?

MR. LOMBARDO: Well, the intent of the parties is determined by the wording of the lease and I think that the wording —

JUSTICE CALLAHAN: Which seems to indicate that it's to proportion an award from a third party to the State of Connecticut.

MR. LOMBARDO: It doesn't say anything about a third party, Your Honor. It says —

JUSTICE CALLAHAN: No, it talks about proportioning. The State of Connecticut can't proportion nothing.

MR. LOMBARDO: It says that the portion of the award that shall be attributed to the leasehold interest will be the unamortized value of the leasehold facilities. That's all it says.

JUSTICE SHEA: Well, I have trouble getting the language you're relying on, "And there shall be paid or turned over to the tenant as or from the award for such taking."

So, it could be that there wouldn't be any apportionment because it speaks about turning over to the tenant as the award for such taking a sum called, and it also contemplates, "Or from the award for such taking." But, in other words, it uses both — both words are used.

In this case your claim is that you're turning over to the tenant as the award for taking the leasehold, the sum that Judge House calculated.

MR. LOMBARDO: It says, "There shall be paid — "

JUSTICE HEALEY: What paragraph? You're on page —

MR. LOMBARDO: I'm on page twenty-one —

JUSTICE HEALEY: Okay, what paragraph?

MR. LOMBARDO: —of the record which is paragraph 28 of the lease contract.

JUSTICE HEALEY: What paragraph are you in, sir?

MR. LOMBARDO: Page twenty-eight, paragraph 28, and I'm in the same sentence as Your Honor. It says, "There shall be paid or turned over to the tenant as the award for such taking —"

JUSTICE HULL: As or from the award, so that your argument is that —

MR. LOMBARDO: Take out the "or from," forget the "or from," Your Honor.

JUSTICE HULL: No, but the way it is, that could apply "as" for a State condemnation and "from" the award for a Federal.

MR. LOMBARDO: Different for a third party, right. So, if you just take out the "or from," use the word, "as," — shall be paid over to the tenant as the award for such taking a sum calculated. Now, I think that really is the crux of the whole problem.

JUSTICE HEALEY: Thank you very much.

MR. LOMBARDO: Thank you, Your Honor. Thank you, gentlemen.

JUSTICE HEALEY: You've used your time. One minute, please keep that in mind. We'll give you one minute.

MR. LAPINE: The only point I wish to make is this is a condemnation of a leasehold, of a leasehold interest, and had the stipulation been we were giving up our interests in the award in order to get two more years, the stipulation, I believe, would have stated that instead of we are not waiving any right to our damage and we're not acquiescing to the State of Connecticut's position.

JUSTICE HEALEY: Thank you.

* * *

Sec. 15-79. State or municipal airports; establishment. Taking of land or interest therein. The state or any municipality, or any two or more municipalities jointly, may establish, maintain and operate an airport at any location within the state approved by the commission and by the municipality or municipalities within which such airport is to be established, and, where such airport is established by a municipality or two or more municipalities jointly, such airport shall also have been approved by such municipality or municipalities in the following manner: Towns, by vote of the town; cities, by vote of the city council; and boroughs, by vote of the borough; and may take any such land or interest therein for such establishment or for the expansion or improvement of an airport when, in the opinion of the commission, public convenience or safety requires, and when the approval of the municipality or municipalities in which such land is located has been legally obtained, upon paying just compensation to the owner of such land or interest therein. In case the state or such municipality or municipalities cannot agree with such owner upon the amount of such compensation, the same shall be determined in the manner prescribed in section 48-12 for the taking of land for state institutions; but an appeal from the amount so determined shall not act as a stay of the taking of such land, provided no facility or land or interest therein held by a public service company for service to the public shall be so taken or removed unless, at the expense of the party seeking such taking or removal, an adequate and equal substitute approved by the public utilities commission shall first be provided. (1949 Rev., S. 4824.)

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Sec. 430. Reference to Trial Referee

In addition to matters required to be referred to a trial referee, the judicial authority may refer any civil nonjury case or, with the written consent of the parties or their attorneys, any civil jury case, pending before such court, in which the issues have been closed, to a trial referee, who shall have and exercise the powers of the superior court in respect to trial, judgment and appeal in such case. Any case referred to a trial referee shall be deemed to have been referred for all further proceedings and judgment, including matters pertaining to any appeal therefrom, unless otherwise ordered before or after the reference. The court may also refer to a trial referee any short calendar matter and any other pretrial matter in any civil nonjury or civil jury case.

CASES IN THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

* * *

21 Conn. 313 (1847)

p. 313

Clark *against* The town of Saybrook:

IN ERROR.

* * *

The power of eminent domain, of which the laying-out of highways is a part, resides in the state, to be exercised by the legislature, unrestricted, except by some constitutional provision.

* * *

p. 324

The power of providing highways for the use of the public, is a branch of what is termed the right of *eminent domain*, which resides in the sovereign authority of a state, (which is here the people, who are the source of all political power,) and is exercised by them, through the instrumentality of the legislature, to whom, by the constitution, they have delegated it, and who must exercise it themselves, or through the agency of subordinate instrumentalities. * * *

TOWN OF DANBURY
vs.
DANBURY AIRPORT CORPORATION

Superior Court Fairfield County File No. 62209

The complaint in an action to condemn a leasehold interest in land for the purposes of a town airport need not allege specifically that the town voted that the action be brought.

It is essential to allege in such a complaint, however, that the town voted to establish an airport and also voted what land should be taken therefor. Allegations that the town is engaged in a project for the enlargement of a certain airport, and that in the completion of the enlargement the town "deems it necessary that it acquire" the leasehold interest, are not the equivalent of these essential allegations (Gen. Stat. [1930] §§ 3092, 5072).

It is not an adequate ground of demurrer to such a complaint that the town seeks merely to break a lease given by the town to the defendant, since while that may be the result, the leasehold is nevertheless property, and, as such, subject to condemnation.

Nor is it a proper ground of demurrer that the premises sought to be condemned are already devoted to a public use. That is a matter to be set up as an affirmative defense and is not an issue of law to be decided on demurrer.

The allegations of the complaint that the taking is for a municipal airport answer a ground of demurrer that no public interest is involved. If elements enter into the case which tend to show that no *bona fide* public interest is intended, that raises an issue of fact and not of law.

MEMORANDUM FILED MAY 13, 1941.

Lazarus S. Heyman, of Danbury, for the Plaintiff.

Willis, Foster & Lister, of Bridgeport, for the Defendant.

Memorandum of decision on demurrer.

INGLIS, J. This is an action to condemn a leasehold interest in land for the purposes of an airport. The first two grounds of demurrer, as it was agreed upon argument that they should be interpreted, are that it is not alleged that the town has authorized either the establishment of an airport, or the condemning of the particular property right involved or the institution of this action.

As regards the last, that is, the authorization for the institution of this action, if the allegations of the complaint as a whole were adequate to indicate that the town had the right to maintain the action, it would follow from that that it would not be necessary to allege specifically that the town had voted that the action be brought. The town itself is the plaintiff. The action must have been instituted by some public official who, it is presumed, is charged with the duty of enforcing by court action whatever rights the town may have. If a municipal corporation has rights, the enforcement of which requires a civil action, it should not be necessary for such municipality to allege and prove that the particular officer who caused the action to be instituted had the express authority of the town to institute that action.

As regards the first two sorts of authority mentioned, however, the case is quite different. "Where the land of an individual is taken *in invitum* for public use, under the provisions of positive law, every requisite of the statute must be complied with, and this must appear on the face of the proceedings for taking the land." *Crawford vs. Bridgeport*, 92 Conn. 431, 435, and cases cited. The right to take the property here in question rests upon section 3092 of the General Statutes,

Revision of 1930, and the method of taking is prescribed by section 5072 of the General Statutes, Revision of 1930.

The first section grants the right to condemn land for an airport only when "any town . . . . may establish an airport" at the location in question. A town can establish an airport only by a vote of a town meeting. It is obvious, therefore, that the petition for the appointment of appraisers must allege that the town has voted to establish an airport and has defined the location of it.

Section 3092 also provides that any municipality which has established an airport "may take any land." This obviously contemplates a vote by the municipality as to what land shall be taken. In that vote the limits of the taking should be specified with reasonable certainty and the petition should contain an allegation of such a vote.

The only allegations along these lines in the petition in this action are that the town is now engaged in a project for the enlargement of the Danbury airport, and that in the completion of the enlargement the town "deems it necessary that it acquire" the leasehold interest. None of this is the equivalent to an allegation that the town has voted to establish an airport or that it has voted to take the interest in real estate sought to be taken in this action. Accordingly, the first two grounds of demurrer are well taken.

The third ground of demurrer is that the complaint seeks merely to break a lease given by the plaintiff to the defendant. The answer to that is that, although that may be the result, nevertheless the leasehold held by the defendant is property and as such is, of course, subject to condemnation.

The fourth ground is that the premises are already devoted to a public use. If that is so it is a matter of fact to be set up by the defendant as an affirmative defense and is not an issue of law to be decided on demurrer.

As regards the fifth ground of demurrer which is that no public interest is involved, the allegations of the complaint are that the taking is for a municipal airport. That obviously is for ã public use and if other elements enter into the case which tend to show that no *bona fide* public use is intended that raises an issue of fact and not of law.

The demurrer is sustained on the first and second grounds for the reasons above set forth and is overruled as to all other grounds.

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Tuesday, May 5, 1981

SENATOR SERRANI: Mr. President.

THE CHAIR: Senator Serrani.

SENATOR SERRANI: Just a further explanation for the need for the bill and the amendment and the amendment does incorporate most of the language in the bill. Right now we have some major time delays in certain projects dealing with transportation particularly in the area of airport expansion and mass transit expansion. This bill for the amendment would cut down on some of the paper work, the timing, roughly three to nine months on many of these projects. As you know, with inflation as it is today, some of these major projects would turn in millions of dollars by being delayed for a month, we're adding a percentage cost onto each project and when you're talking forty-seven million or you're talking a hundred million dollars, that's a good chunk of dollars that the state is not able to make up and with federal cutbacks as they are, it's important that we move quickly on all of these projects and the Department of Transportation is well equipped to do this as they have been doing for many years in the highway and bridge area.

* * *

SENATOR SERRANI: Mr. President, this amendment comes by way of the Department of Transportation and it specifically is designated for the use of expansion at Bradley Airport. The Finance Committee here in the General Assembly has passed one hundred million dollar bonding authorization for the completion of the Bradley master plan and in that the department wants to move ahead with this program, they're in a situation where they must condemn a

lease on the property at Bradley. This would allow the Department again to relocate cargo facility owned by the Bradley Facilities, Inc. The B.F.I. has had a twenty year lease with tenure renewal option. They're currently in the nineteenth year of that lease and D.O.T. department would like to be able to condemn their own lease with this amendment. Now presently the Department of Transportation can condemn a fee simple property interest and they're seeking to do the same here with a leasehold (inaudible). Without the amendment the State of Connecticut, their hands would be tied in the negotiating process at Bradley Airport, so I'd move adoption of the amendment and try to answer any questions you may have on it.

* * *

Wednesday, May 6, 1981

* * *

SENATOR SERRANI: And again, I would state that this amendment deals specifically with the Bradley Airport. The expansion of the Bradley Airport is contingent upon relocating one cargo facility owned by the Bradley Facilities, Inc. They have had a twenty-year lease with a ten-year renewal option. They are in their nineteenth year. The (next word unintelligible) of our lease is with the State. The Department of Transportation would like to be able to condemn their own lease with this amendment. The Department can condemn a fee simple property interest and should also be able to condemn a lease-hold which is a lessor's property interest. Without this amendment one hand of the state will be obviously tied in negotiating with the tenant and without this amendment the one hundred million dollar bond authorization from the Finance Committee, which will be on our desks shortly will not be able to be completed or started without the ability to condemn this leasehold. The Department feels very strongly about this aspect of the bill and I certainly do too considering the cost of construction today and the inflationary cost of roughly one percent a month if we are to hold up the Bradley International Airport we would be doing a great disservice to the public, and to the taxpayers in terms

of the dollars that would be needed to obtain in future years to complete the project.

So I would ask for support for this amendment.

* * *

SENATOR SERRANI: Mr. President, through you, sir. The first question, I guess, was the question of whether or not the same commissioner who made the lease would have the opportunity to condemn that through the bill. The lease in this case was twenty years ago, so it was not the same commissioner. I might say in that light also that there are roughly one hundred leases at the airport, ninety-eight of those one hundred leases have incorporated within the agreement the understanding that the condemnation of the leasehold is part of that arrangement. There are only two that do not have that understanding or at least some clear understanding of that. I think the intent is there but it is unclear of that understanding, and therefore, that's why the legislation, the amendment is before us. Again, the reason there are two out of that one hundred with an unclear statement as to the opportunity for condemnation of their leasehold is that those leases were perpetuated some twenty years ago, and therefore were not of recent vintage.

As to the provision of the decision being conclusive that follows the existing statutory language under Section 13b-42, subsection (c) under the Aeronautics portion of the Department of Transportation's statutes whereby the commissioner has that same right with the municipal airports and the language used there in subsection (c) is conclusive, and so it just follows the existing statutory language in those subject areas of transportation.

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House of Representatives Wednesday, May 27, 1981

DEPUTY SPEAKER FRANKEL: The question is on acceptance of the Joint Committee's favorable report and passage of this bill in concurrence with the Senate. Will you remark, Rep. Pier?

REP. PIER: (15th) Yes, Mr. Speaker. Ladies and gentlemen, this bill which we have before us is a rather important priority item for the development of public transportation projects in the state of Connecticut. It is keyed primarily to enabling legislation for the expansion and development of Bradley International Airport but also affects other major transportation facilities including rail stations and the like.

* * *

REP. PIER: (15th) Mr. Speaker and ladies and gentlemen, Senate Amendment "C" is really substitute language for what appeared out of the Transportation Committee as transportation bill 7291. It kind of got lost in the shuffle in the last day in Government Administration and Elections and what it provides is the authority to the Commissioner of Transportation to condemn leaseholds in the same basis as any other property interest at an airport facility.

What has happened is there are two long term leases at Bradley in particular. There is some question there in the 19th year and they have a option to renew which is already been exercised by the holder of the lease. In order to facilitate the development according to the updated master plan, the state is going to need to condemn these leaseholds. It is simply enabling legislation to make it very clear that the state has the authority to condemn the leases. It's probably already true in the law but there is some question at whether it would

have to go to litigation because the law now allows for a condemnation of an interested property in order to facilitate the process and avoid the possibility of litigation, the Department of Transportation has asked for rather clear authority to condemn a leasehold interest.

What we are doing, of course, if not taking property away without compensation. This condemnation would go through the regular process. It would have to be evaluated. If there is a controversey (sic) (controversy) over the amount they attempt to negotiate on a bi-lateral basis without the need for legislation. That hasn't been successful because two leaseholders there have a rather good deal and for some strange reason are not willing to voluntarily give it up.

So what this does is pull that provision back into the statute, allow the Commissioner to condemn leaseholds in the same basis as he can any other property. I move adoption of the amendment.

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SENATE/HOUSE
TRANSPORTATION COMMITTEE
1981

Senate Bill 1425
P.A. 81-421

* * *

State Capitol
Room 419
March 30, 1981
TRANSPORTATION 1:00 P.M.

PRESIDING CHAIRMEN: Senator Serrani
Representative Pier

COMMITTEE MEMBERS PRESENT:

SENATORS: Serrani, Morano, Casey

REPRESENTATIVES: Pier, Atkin, Gelsi, Wilber, Smith, Savage, Kusnitz, Ruwet, Murphy, Conn, Niedermeier, Miscikoski

* * *

COMMISSIONER ARTHUR B. POWERS: Mr. Pier and honorable members of the Committee, I'm here to testify on committee Bill *number 1425.* This is a Department of Transportation bill. It is one which we believe will enhance the speedy and orderly development of Bradley International Airport. And, by the way, the update of the master plan is completed, and Mr. Chairman, it will be distributed to the Governor of the Office of Policy and Management and the Committee staff within the next couple of days. In fact, I expect the Governor will be getting his this afternoon so we will have it, uh, in fact, we can get you one if you want it within a half hour if you want it now.

* * *